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In the Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. Like The Eighth Circuit, Respondent Puts A Thumb On The Wrong Scale: Punitive Damages Are Presumptively *Not* Available In This Case

As we showed in our opening brief (at 17-23, 23-25), two fundamental principles of law – the Spending Clause constraints reflected in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), and the immunity from punitive damages enjoyed by municipal governments reflected in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) – require a presumption that punitive damages are *not* available in this case. Respondent's effort to elude that presumption, and advance the *contrary* presumption based on *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), is unavailing.

A. Spending Clause Principles Are Fully Applicable To The Statutes At Issue In This Case

1. According to respondent, Spending Clause principles limit only the "*type of conduct* for which defendants may be held liable under Spending Clause legislation," not "the *form of relief*" available to a successful plaintiff. Resp. Br. 37 (emphasis in the original). That is simply not so. "By insisting that Congress speak with a clear voice," Spending Clause principles "enable the States [or municipalities] to exercise their choice knowingly, cognizant of *the consequences* of their participation" in a federal grant program. *Pennhurst*, 451 U.S. at 17 (emphasis added). Plainly enough, the damages that may be imposed on a grant recipient for breaching its obligations are among "the consequences" – perhaps among the most severe consequences – that may attend participation in a federal program. See *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 656 (1999) (Kennedy, J., dissenting) ("Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to accept federal funds"). This Court has accordingly held that the "contractual nature" of a given statute "has implications" not only for the type of conduct that may be treated as a breach, but also "for our construction of *the scope of available remedies*." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287

(1998) (emphasis added). After all, the Court has explained, the "central concern" of Spending Clause principles "is with ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'" *Ibid.* (quoting *Franklin*, 503 U.S. at 74). Whether a recipient may be held "liable for a monetary award" obviously turns not only on the "type of conduct" for which liability may be imposed, but also on what types of "monetary awards" are available.

Respondent contends (at 38), however, that if Spending Clause constraints extend to remedies, and not just to conduct, then even compensatory remedies – and perhaps even private causes of action themselves – may be suspect. Respondent notes that where a court implies a private cause of action or a compensatory damages remedy, it cannot "be said that the funding recipient was clearly on notice that its conduct would subject it to the particular relief at issue." *Ibid.* There is some force to that view; "[w]hether the Court ever should have embarked on this endeavor under a Spending Clause statute is open to question" (*Davis*, 526 U.S. at 685 (Kennedy, J., dissenting)). But there is not much to be said for respondent's invitation to take the next, rather considerable step down the same path and infer a right to exact a private punishment under a Spending Clause statute. To the contrary, the Court has, in its most recent decisions, "retreated from [its] previous willingness" to imply and extend causes of action where Congress has not affirmatively spoken. *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 519 n.3 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001).

And punitive damages are a very good place to "draw the line" (Resp. Br. 38). For one thing, as we explained in our opening brief (at 22) – and as respondent does not dispute – punitive damages are *not* a permissible remedy for a common law breach of contract. Because "legislation enacted pursuant to the spending power is much in the nature of a contract" (*Pennhurst*, 451 U.S. at 17), the "contractual framework" (*Gebser*, 524 U.S. at 286) itself forecloses resort to punitive damages.

Punitive damages, it should be added, are especially ill-suited to a contractual regime. "Because juries are accorded broad discretion both as to the imposition and amount of punitive damages, * * * the impact of these windfall recoveries is unpredictable and potentially substantial." *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 50 (1979). But an "unpredictable" and yet "potentially substantial" damages liability is precisely what contractual principles forbid. Grant recipients are entitled "to exercise their choice knowingly, cognizant of the consequences of their participation" (*Pennhurst*, 451 U.S. at 17). They don't want surprises.

Punitive damages are also likely to be duplicative of compensatory awards under a Spending Clause statute. As the Court explained in *Gebser*, and again in *Davis*, to award even compensatory damages for breaches of a Spending Clause obligation requires proof that the grant recipient "intentionally acted in clear violation" of the statute. *Davis*, 526 U.S. at 642 (citing *Gebser*, 524 U.S. at 290). But there is little daylight, as a practical matter, between "intentional acts" that are "in clear violation" of law and acts taken with "malice" or "reckless indifference to plaintiff's rights" – which was the standard by which respondent secured $1.2 million in punitive damages over and above the $1 million he received in compensatory damages. JA 72. Put another way, conduct that is sufficiently "intentional" to warrant compensatory relief is likely always to be subject to punitive exactions as well.

In respondent's view, however, "this Court expressly held in *Franklin* that the Spending Clause principles articulated in *Pennhurst* * * * d[o] *not* limit the relief available for intentional violations of Spending Clause-based civil rights legislation." Resp. Br. 37. As respondent sees it, the Spending Clause exerts no gravitational force at all "in cases involving intentional civil rights violations." But *Franklin* says no such thing. The question presented in *Franklin* was whether, under *Pennhurst*, there could be *no monetary damages at all* for a violation of a Spending Clause statute. See U.S. Br. 12. The Court held that in a case in which intentional conduct is alleged, the "notice problem does not arise," and thus monetary relief in

some form is potentially available. Nowhere, however, did the Court intimate that punitive damages in particular might be awarded. To the contrary, as we explained in our opening brief (at 25-29), and as we reiterate below (at 8-12), *Franklin* has no bearing at all on punitive, as opposed to compensatory, damages.[1]

2. Respondent's remaining challenge to the application of Spending Clause principles may be dispatched more briefly. In his view, "[w]hatever limits the Spending Clause may place on relief under statutes passed on its authority" – such as Section 504 of the Rehabilitation Act – "there is no basis for importing those constitutional limits into the ADA, a statutory scheme based on sources of authority to which limits on the spending power are irrelevant." Resp. Br. 38. Although respondent recognizes that Title II of the ADA expressly "adopts the Rehabilitation Act's remedial scheme," he asserts that it did so without carrying with it the "Spending Clause limitation[s]" attached to that remedial scheme. That's some trick, and respondent provides no indication of how it was performed. What Title II in fact "imported" (Resp. Br. 39) were "[t]he remedies, procedures, and rights set forth in" Section 504 – a Spending Clause statute – which in turn incorporated "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" – another Spending Clause statute, whose remedial scheme is the product of judicial implication. Had Congress intended to borrow only the literal language of those statutes, stripped of the legal context in which they were enacted, presumably it would have said so (assuming the English language is suited to the task). It did not.

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[1] Nor was there the slightest suggestion in *Davis* that whenever the grant recipient "intentionally engaged in the unlawful conduct" (Resp. Br. 36), "the full range of appropriate relief" – including, by respondent's lights, punitive damages – is "available under *Franklin*." *Davis* had no occasion to define – indeed it did not even address – what types of damages might be awarded in an action under a Spending Clause statute.

B. The Immunity Principle in *City of Newport* Strengthens The Presumption Against Punitive Damages In This Case

This Court's decision in *City of Newport* held that Congress did not intend to authorize awards of punitive damages against a municipal government in an action brought under 42 U.S.C. § 1983. The Court detailed the long tradition in American law – continuing to this day – of affording municipal governments immunity from punitive liability. 453 U.S. at 259-63. As we explained in our opening brief (at 23-25), this background principle of governmental immunity recognized in *City of Newport* is no less informative in discerning Congress's intent concerning the availability of punitive damages in actions brought under Section 504 of the Rehabilitation Act and Section 202 of the ADA.

1. Respondent first contends that this Court should refuse to consider *City of Newport* altogether. Respondent recites the general rule that this Court will not "'ordinarily consider'" "'issues that are neither raised nor considered by the Court of Appeals.'" *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 213 (1998) (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Respondent maintains that the "*Newport* point" was an "issue" that was "neither argued nor decided" below. Resp. Br. 41. *City of Newport*, says respondent, should therefore be ignored.

Respondent's suggestion misses the mark. We have no quarrel with the rule of prudence that respondent states, but the rule has no application here. The *issue* we raised in this case concerns the interpretation of the ADA and Rehabilitation Act; our *claim* is that petitioners do not have to pay respondent punitive damages. The argument about *City of Newport* is simply that – an *argument* as to how Title II and Section 504 should be interpreted, different from the other arguments, but directed at precisely the same *issue* or *claim*. This Court has never held that it should not address *arguments* not raised below, and for good reason. It would be passing strange if, for instance, this Court refused to interpret a statute according to its

text simply because the parties relied below only on legislative history. And it's no surprise that that is not the Court's rule.

The longstanding rule, rather, is that "[o]nce a federal claim is properly presented, a party can make *any argument* in support of that claim; parties are *not limited* to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (emphases added); accord *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 678 n.27 (2001); *Harris Trust & Sav. Bank* v. *Salomon Smith Barney*, 530 U.S. 238, 245 n.2 (2000) (petitioner was in no way precluded from raising a new "argument in support of a claim," as opposed to "an independent claim"); see also, *e.g.*, *Carlson* v. *Green*, 446 U.S. 14, 16 n.2 (1980) (addressing an *issue* not raised below because "the issue is squarely presented and fully briefed"; "the interests of judicial administration will be served by addressing the issue on its merits"). This case thus bears no resemblance to *Yeskey*, where the petitioners argued below that the ADA by its plain terms did not apply at all, but then added a new *issue* or *claim* before the Court, that the ADA as applied was unconstitutional. See 524 U.S. at 212-13.

Instead, this case is like *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). There, the petitioner argued before the lower courts that Amtrak was a private entity but nonetheless subject to First Amendment constraints; before this Court the petitioner argued that Amtrak was part of the federal government itself. Citing *Yee*, 503 U.S. at 534, and *Dewey* v. *City of Des Moines*, 173 U.S. 193, 198 (1899), the Court said that the latter contention was "not a new claim within the meaning of that rule [set out in *Yee*], but a *new argument to support what has been his consistent claim*," that Amtrak had violated the First Amendment. *Lebron*, 513 U.S. at 379 (emphasis added). So here. Petitioners have always claimed, and claimed only, that they are not required under the relevant statutes to pay punitive damages. The citation to *City of Newport* is simply another argument in support of that claim. This Court has no reason not to address it.[2]

2. On the merits, respondent contends (Resp. Br. 44-47) that Congress intended "to override" the *City of Newport* presumption when it abrogated State sovereign immunity under both Section 504 and under the ADA. But the provisions at issue make no mention of punitive damages (or municipalities, for that matter); and "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States* v. *Bestfoods*, 524 U.S. 51, 63 (1998). In any event, there is no basis for inferring an intent to extend punitive damages to municipal defendants. All these provisions purport to do is subject States to the same "remedies" that are "available for such a violation in an action against any public or private entity other than a State." But punitive damages are not "available" against *any* defendants under Section 504 or Title II. Indeed, only in 1991 were such awards extended to *any* Rehabilitation Act or ADA defendants – and even then, *only* under the employment provisions, and *not* against government defendants.

That is surely an odd way of "overriding" the presumption articulated in *City of Newport*.

C. Respondent's Contrary Presumption Rests On A Fundamental Misreading Of *Franklin*

Like the court below, respondent embraces exactly the opposite presumption in this case. Quoting from this Court's decision in *Franklin*, respondent asserts (at 14) that "'[t]he "existence of a statutory right implies the existence of all necessary and appropriate remedies."'" But respondent wrenches that

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[2] As respondent correctly points out (Resp. Br. 41-42), the reason petitioners did not rely on *City of Newport* below was that they contended that they were an instrumentality of the State, not a municipality. The Eighth Circuit rejected that view. And the Eighth Circuit's belief that it was "compel[led]" by its reading of *Franklin* makes it exceedingly unlikely that it would have reached a contrary decision had *City of Newport* been called to its attention.

language from the context of *Franklin* itself. For one thing, no claim for punitive damages was even advanced in *Franklin*. The question, instead, was whether damages *in any form* could be inferred under Title IX, in light of the fact that a decision not to recog[illegible]e a damages remedy "would leave petitioner" with "no remedy at all." 503 U.S. at 76; see *ibid.* (denial of damages relief would leave victim of sexual harassment "remediless"). The Court's guiding concern was that the absence of some form of damages remedy would "render inutile causes of action authorized by Congress." 503 U.S. at 74; see also *Doe* v. *County of Centre*, 242 F.3d 437, 456 (3d Cir. 2001) (explaining that the *Franklin* presumption "is rooted in the common law principle * * * that a right without a remedy is not a right at all"). Plainly, no such concerns are present here, as respondent received more $1 million in compensatory damages (which included $150,000 for pain and suffering). Pet. App. 21a.

Respondent also misapprehends the "long line of decisions" on which "*Franklin* rested." Resp. Br. 15. Although respondent recognizes (*ibid.*) that *Franklin* relied prominently on the decision in *Bell* v. *Hood*, 327 U.S. 678 (1946), he overlooks the central premise of that case (even as he quotes the words themselves): "Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy *to make good the wrong done*." 327 U.S. at 684 (emphasis added). That "compensation principle" (*International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 49-51 (1979)), of course, has nothing to do with punitive damages, which are awarded for purposes above and beyond "mak[ing] good the wrong done" (*Bell*, 327 U.S. at 684), such as "punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 568 (1996). And because "juries assess punitive damages in wholly unpredictable amounts," the awards typically "bear[] no necessary relation to the actual harm caused" (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); yet remedying

"the harm caused" was precisely the point of the *Franklin* decision.[3]

Nor is there the slightest evidence in this Court's case law that "[t]he *Franklin* presumption is fully applicable to punitive damages." Resp. Br. 15. Respondent fails to identify a single case in which this Court inferred a punitive damages remedy under a Spending Clause statute – and we are unaware of any.[4] Even apart from Spending Clause cases as such, it is hard to square the proposition that punitive damages are "presumptively" available with cases like *Foust*, in which the Court, far from "presuming" anything about the availability of punitive damages, rejected an implied remedy of punitive damages under the Railway Labor Act because such an "extraordinary sanction" is not needed to satisfy the "compensation principle" that has traditionally informed the selection of appropriate remedies.

True, punitive damages are "'a firmly established feature of American law.'" Resp. Br. 15 (quoting *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring in judgment)). The fact that *state* law embraces punitive damages as a remedy does not, however, authorize courts to infer a punitive damages remedy for the violation of a federal right when Congress is silent. To the contrary, even when it acts pursuant to grants of authority other than the Spending Clause, Congress

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[3] The fact that punitive damages may be characterized as a type of "remedy" (Resp. Br. 30) obviously does not mean that they are the type of remedy to which the presumption in *Franklin* extends. Only by denuding that case of its factual and legal context can respondent contend otherwise. Nor did this Court in *Smith* v. *Wade*, 461 U.S. 30 (1983), "reject precisely the argument now advanced by petitioners." Resp. Br. 30. That case construed 42 U.S.C. § 1983, a statute that "create[d] 'a species of tort liability'" and which therefore drew on "the common law of torts" (*id.* at 34). It said nothing about the kinds of remedies that may be inferred under a Spending Clause statute. And it certainly did not begin with a presumption that all remedies must be available when Congress explicitly says otherwise.

[4] Respondent's reliance (Br. 16) on cases involving constitutional torts is obviously misplaced.

ordinarily must speak clearly when it wishes to impose punishment. See, *e.g.*, *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959); *Elliott* v. *East Pa. R. Co.*, 99 U.S. 573, 576 (1878). And courts are appropriately reluctant to infer a punitive remedy because the exaction and calibration of punishment is quintessentially a legislative function. See *United States* v. *Bajakajian*, 524 U.S. 321, 336 (1998) ("judgments about the appropriate punishment for an offense belong in the first instance to the legislature"); *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, * * * these are peculiarly questions of legislative policy").[5]

In short, if *Franklin* effects a "presumption" at all, it is a presumption that compensatory damages may be inferred under Spending Clause statutes for injured parties who would otherwise be left without a remedy. It must be added, however, that this Court's more recent decisions have called into question even the limited presumption in *Franklin*. In addition to relying on *Bell* v. *Hood*, *Franklin* relied heavily on the Court's decision in *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), which it cited for the proposition that "all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies." *Franklin*, 503 U.S. at 68. Respondent quotes that language (Resp. Br. 68), but fails to mention that the Court derived that "general rule" (503 U.S. at 68) from *Borak*. And the omission is telling, because this Court has quite explicitly "'abandoned' the view of *Borak* decades ago," and has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one." *Correctional Servs. Corp.* v. *Malesko*,

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[5] Respondent cites (at 32) *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), as "holding that the burden is on a party opposing punitive damages 'to show that Congress intended to preclude such awards.'" He neglects to mention, however, that the question presented in *Silkwood* was *not* whether a punitive damages remedy could be judicially inferred under a federal statute (much less under a Spending Clause statute), but rather whether Congress intended the federal statute to preempt the availability of punitive damages under state tort law.

122 S. Ct. 515, 519 n.3 (2001). Accord *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).

Finally, and in all events, the *Franklin* presumption – whatever its scope and continued vitality – has no bearing on claims brought under Section 504 of the Rehabilitation Act and Title II of the ADA.[6] As we explained in our opening brief (at 29-30), this Court's decision in *Lane* v. *Peña*, 518 U.S. 187 (1996), held that, because the Rehabilitation Act (whose remedies were adopted by Title II) "contains a provision labeled 'Remedies and attorney fees'"– and thus, unlike Title IX, is not "silent on the question of remedies"– the case therefore fell "outside the 'general rule' we discussed in *Franklin*." *Id.* at 197. True, the question presented in *Lane* was different: whether a remedy could be implied under Section 504 against a federal agency. But the *reasoning* of *Lane* applies to the present case with full force. "Title IX, the statute at issue in *Franklin*, made no mention of available remedies," and thus the Court felt free in *Franklin* to adopt a presumption to fill the breach. *Ibid.* Section 504, "by sharp contrast" (*ibid.*), contains a remedy provision. While that provision may not fully "delineate the scope of the relief available" (Resp. Br. 35) – although it *does* include a specific attorneys fee provision, which respondent notes in a reticent footnote (Br. 35 n.12) – the fact remains that Congress did not simply remain mute with regard to the question

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[6] Respondent asserts that "[t]he lower courts have broadly agreed that the *Franklin* presumption applies to punitive damages * * * under civil rights legislation such as Title VI, * * * Title II * * * and Section 504." Resp. Br. 32 n.11. Not so. For one thing, respondent inexplicably fails to cite anywhere in his brief an en banc court of appeals decision *directly contrary and directly on point*, *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996) (en banc), and one addressed repeatedly in our briefs and in the petition. For another, none of the cases that respondent cites in his footnote (save one) involved any one of those statutes; the one exception, *Burns-Vidlak* v. *Chandler*, 980 F. Supp. 1144 (D. Haw. 1997), is – for the reasons we have advanced in our briefs – wrongly decided. A district court decision in conflict with a court of appeals decision does not, to understate considerably, reflect any consensus among the lower courts.

of remedy. Under *Lane*, that should be enough to "bring[] this case outside the 'general rule' * * * discussed in *Franklin*." 518 U.S. at 197.

II. The Evidence Of Congressional Intent Does Not Overcome The Presumption Against The Availability Of Punitive Damages In This Setting

Far from overcoming the presumption against the availability of punitive damages, the evidence makes clear that Congress did not intend to authorize a punitive damages remedy in actions like this one.

A. Statutory And Regulatory Framework

The availability of quasi-criminal exactions, levied by lay juries possessed of substantial discretion, is manifestly inconsistent with the carefully calibrated remedial scheme created by Congress in Title VI (and incorporated by extension into the provisions at issue in this case). As we explained in our opening brief (at 31-34), Congress adopted significant procedural hurdles before the "*punishment* of cutoff of federal funds" (*Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Me. 1985) (emphasis added)) may be imposed. In addition to the requirement that voluntary compliance be sought initially, Section 602 provides that, before the government may take an enforcement action that involves the termination of, or the refusal to grant or continue, financial assistance, "the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." 42 U.S.C. § 2000d-1. What is more, "[n]o such action shall become effective until thirty days have elapsed after the filing of such report." *Ibid.* Finally, Section 603 allows for judicial review of adverse administrative action taken under Section 602. 42 U.S.C. § 2000d-2.

Try as he might, respondent cannot square the imposition of an "unpredictable and potentially substantial" (*Foust*, 442 U.S. at 50) punitive damages remedy with this carefully wrought statutory scheme. It is one thing to decide, as this Court did in

Cannon and *Guardians*, that a private damages remedy *in some form* may be compatible with a system of federal enforcement. See Resp. Br. 26-28. It is quite another matter to assert that punitive damages – which are available with relatively few procedural constraints – may be reconciled with a statutory framework in which the most severe *express* remedy is cabined by elaborate safeguards. See *Gebser*, 524 U.S. at 289. Congress went to extraordinary lengths to ensure that grant recipients would not be punished absent notice, an opportunity to cure any deficiency, and the exhaustion of procedural hurdles. Punitive damages, by contrast, may be imposed if, after a single violation, a jury – "accorded broad discretion" (*Foust*, 442 U.S. at 50) – concludes that the violation in question is sufficiently egregious.

Punitive damages also effect a deep intrusion on administrative prerogatives. Whereas compensatory damages seek to address "an isolated violation" by "[t]he award of individual relief" (*Cannon*, 441 U.S. at 705), punitive damages are designed to punish and deter (*BMW* v. *Gore*, 517 U.S. at 568), and, as such, they focus on the systematic performance of the grant recipient. That is the government's function – not the province of lay jurors. Punitive damages may also dwarf the federal grant itself – and as the Solicitor General points out, the prospect of such awards may therefore "deter entities from accepting federal financial assistance" in the first place. U.S. Br. 26.[7] True, "even a compensatory damages award could exceed

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[7] Respondent speculates that "in the great majority of cases" an award of punitive damages "will likely not approach the amount of money a funding recipient receives from the federal government over time." Resp. Br. 28. The only support respondent offers for this prediction is a citation from this Court's *Guardians* case – which of course did not address punitive damages at all. To the contrary, the dissenting opinion of Justice Stevens – from which respondent quotes at length (*ibid.*) – states only that "'*an individualized remedy* for the victim of a Title VI violation'" is likely to be less drastic than the cutoff of federal funds. *Ibid.* (quoting 463 U.S. at 638-39 n.7) (emphasis added). In any event, a rational grant recipient will look not only at the likely recovery in any given case, but also at the *total* recoveries, compensatory and punitive, across all expected lawsuits. Those dollars may be daunting.

the amount of financial assistance a defendant receives" (Resp. Br. 28). But "in for a penny, in for a pound" is no way to run a federal grant program. Compensatory damages at least have the virtue of comparative predictability and "individualized" (*Guardians*, 463 U.S. at 638-39 n.7 (Stevens, J., dissenting)) calculation. Punitive damages, on the other hand, are notoriously hard to predict, both in frequency and amount.[8]

In respondent's view, however, "[t]he overall structure of the ADA" – though not Section 504 – "reveals that if Congress had intended to foreclose punitive damages under Title II, it would have done so expressly." Resp. Br. 19. In particular, respondent notes that whereas Title III, outlawing private-sector discrimination in connection with "public accommodations," forbids the Attorney General from seeking punitive damages, there is no such explicit prohibition in Title II. According to respondent, Title III "illustrates not only that Congress knew how to – and did – exclude punitive damages when it wanted to do so, but also, and more importantly, that Congress was aware that if it provided a right of action for 'monetary damages' and did *not* exclude punitive damages, the likely (and logical) inference would be that it intended to permit them." Resp. Br. 20. But an express prohibition of punitive damages (as in Title III) is not the only way of foreclosing resort to punitive damages; another way to accomplish the same result is to adopt the remedies of another statute (Title VI) that had uniformly been construed to preclude an award of punitive damages. See *infra* pages 15-16. As for the suggestion that a reference to "monetary damages" otherwise conveys the availability of punitive damages absent a specific exclusion, the short answer is that Title II *does not refer to "monetary damages" at all* – it refers to Section 504, which in turn refers to Title VI. Neither of those provisions mentions "monetary damages" at all.

[8] Recognizing, perhaps, that punitive damages are impossible to square with the procedural protections of Title VI, respondent contends that "[b]ecause Title II is not limited to federally funded activities, its remedies need hardly be measured against the irrelevant enforcement mechanism of a cutoff of federal funds." Resp. Br. 26. Once again, however, Title II explicitly adopts the remedies prescribed by Section 504, which in turn adopts the remedies of Title VI.

B. The Prevailing Judicial Interpretation Of Title VI

As we explained in our opening brief (at 39), the ADA incorporates by explicit reference the "remedies, procedures, and rights" available under the Rehabilitation Act, which in turn incorporates the remedies available under Title VI. As the Eighth Circuit itself acknowledged, when Section 505 of the Rehabilitation Act was enacted (1978) and when the Act was thereafter amended (1986, 1987, and 1991), courts were "in near unanimity that [Title VI and Section 504] did not permit punitive damages." Pet App. 13a-14a; see also Pet. Br. 39-40.

Nothing respondent says refutes our argument. Respondent insists (at 11-12) that "damages" were available under Title VI and Section 504, citing a House Judiciary Committee report and some judicial decisions that were mentioned there. H.R. Rep. No. 101-485(III); *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir. 1982); *Nelson* v. *Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983); *Fitzgerald* v. *Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (D. Iowa 1984). Respondent then points to the Report's seeming endorsement of language from *Nelson*, that Section 504 (and presumably Title VI) offered plaintiffs "a full panoply of remedies." *Id.* at 52. But *Miener* never even alluded to *punitive* damages (as opposed to compensatory damages). Nor does *Nelson* (despite mentioning "panoplies") hold that *punitive* damages (as opposed to compensatory damages) were a permissible remedy under Section 504. Even in *Fitzgerald*, where the district court *declined* to award punitive damages to a Section 504 plaintiff, the court said only (if incautiously) that punitive damages are "*presumably* available under § 504," 589 F. Supp. at 1138 (emphasis added).

In any event, a single reference in a single Committee Report from a single House of Congress hardly reflects "Congress's stated intent" on the question, as respondent would have it (Resp. Br. 44). See, *e.g.*, *Hoffman Plastic Compounds, Inc.* v. *NLRB*, No. 00-1595, slip op. at 11 n.4 (Mar. 27, 2002); *Bank One Chicago, N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264,

279 (1996) (Scalia, J., concurring in part and concurring in judgment). Rather, Congress expressly incorporated, in the text of Title II, the remedies of Section 504; and in Section 504, the remedies of Title VI. *Punitive* damages were not available to Section 504 plaintiffs; and the reason is that they were not available to Title VI plaintiffs. That rule – that punitive damages were not available – was the rule at all the relevant times.

C. The Civil Rights Act of 1991

As we noted in our opening brief, the Civil Rights Act of 1991, which added Section 1981a to Title 42 of the U.S. Code, created a limited and carefully defined right to seek punitive damages (subject to specified monetary caps based on the size of the offending employer) in certain actions brought for intentional discrimination in employment. The punitive damages provision applies to actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of Title I of the ADA, 42 U.S.C. § 12112. Significantly, it does *not* apply to actions brought under Section 504 or 202. Moreover, the 1991 Act *expressly exempts* from punitive liability under its new provisions any "government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1); see also *County of Centre*, 242 F.3d at 457. Even the court below recognized that inferring a punitive damages remedy under Title II of the ADA "turns * * * on its head" Congress's evident intent in the 1991 legislation. Pet. App. 15a.

None of this gives respondent any pause, however, because, in his view, while the 1991 amendments expanded the "expressly limited" remedies available for employment discrimination, they shed no light on the remaining provisions – such as Section 504 and Title II of the ADA. Resp. Br. 20-24. "Indeed," respondent adds, "the framers of the 1991 Act were careful *not* to limit punitive damages remedies that already existed under the civil right laws." *Id.* at 23. This argument simply makes no sense of the statutory materials. As a result of the 1991 amendments, Title I now includes *an express* authorization of punitive damages, but (I) applicable *only* to employment cases, (ii) capped at $300,000, and (iii) explicitly unavailable when the

defendant is a governmental entity. Yet according to respondent, Title II – which was *not* amended to include punitive damages; which incorporated remedy provisions that had *never* been construed to permit punitive damages; and which covers *only* actions against governmental entities – should nevertheless be construed to *permit* an award of punitive damages in cases like this. Can that possibly be?

D. Respondent's Reliance On "The Policies" Of Title II and Section 504 Is Misplaced

Bereft of textual support, respondent invokes "the policies of Title II and Section 504" as a basis for permitting punitive damages. To begin with, courts are not generally authorized, in the name of "policy," to infer a punitive damages remedy, especially under a Spending Clause statute. This Court has "sworn off the habit of venturing beyond Congress's intent," even in aid of doing what seems "'necessary to make effective the congressional purpose.'" *Alexander* v. *Sandoval*, 121 S. Ct. at 1520. Statutes can and do serve an array of "purposes" or "policies" – often competing ones that have been compromised in the service of consensus. See Frank H. Easterbrook, *Foreword: The Supreme Court, 1983 Term: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984). Choosing among them, and then deciding how best "to make effective the congressional purpose," is an "understanding of private causes of action that held sway 40 years ago" – but no longer. *Alexander* v. *Sandoval*, 121 S. Ct. at 1520.

In any event, respondent's policy arguments make a hash of the two statutes. While punitive damages doubtless "mak[e] it more expensive to violate the Act," it hardly "advance[s] the ADA's policy of eliminating discrimination against people with disabilities" to threaten grant recipients with large, and highly unpredictable, punitive damages awards. Resp. Br. 25. For one thing, Section 504 and Title II, by their terms, already contain significant deterrents against violations through the cutoff remedy. Compensatory damages are also a powerful deterrent in their own right. See, *e.g.*, *Memphis Community Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310 (1986) (noting that the Civil Rights

Act of 1871 "presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations"). In the present case, for example, respondent was awarded $1 million in compensatory damages, including $150,000 on account of pain and suffering. Pet. App. 21a.[9]

Of course, there can always be *more* deterrence through heftier and more unpredictable damage awards. But "[d]eterrence is a function of degree, and nothing in the Rehabilitation Act or in the case law commands that it be maximized at all costs." *Lussier* v. *Runyon*, 50 F.3d 1103, 1112 (1st Cir. 1995). As the Solicitor General explains in greater detail (Br. 24-28), the threat of punitive damages is likely to frustrate the programmatic objectives of the statutes and, in the case of Section 504, "perhaps even deter entities from accepting federal financial assistance" in the first place. *Id.* at 26. At a minimum, the imposition of large awards will siphon money away from the programs themselves. More generally, saddling municipalities with sizeable awards of punitive damages places a "strain on local treasuries and therefore on services available to the public at large." *City of Newport*, 453 U.S. at 271. And, it need hardly be added, inferring a right to punitive damages will spawn additional litigation, as inventive litigants and their lawyers (see, *e.g.*, Amicus Brief of the Ass'n of Trial Lawyers of America and AARP in Support of the Respondent) explore the contours and content of this unprecedented remedy.[10]

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[9] "Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 438 n.11 (2001); see also Amicus Brief of the Int'l City/County Mgmt. Ass'n, et al., at 25 (punitive damages served historically as "a partial remedy for the defect in civil procedure which denies compensation for actual expenses of litigation, such as counsel fees" – a defect remedied by Section 505 of the Rehabilitation Act). As the scope of compensatory relief has widened, the "policy" reasons for exacting punitive damages as well lose force.

[10] Even now, respondent warns that "in a proper case" courts will next have to consider whether "an award of punitive damages might be limited by consideration of the amount of federal financial assistance received by a defendant and/or the financial gain reaped by the defendant through noncompliance with federal law." Resp. Br. 29 n.10. The "proper case," of course, is typically the next one following the creation of the underlying remedy.

All of these are reasons to leave the determination of punishment where it belongs – with Congress. Congress is best suited – and is constitutionally charged – with deciding whether punishment is warranted and, if so, how much. It discharged that function in 1991 when it added a punitive damages provision to the Rehabilitation Act and to the ADA, but calibrated the awards, capped the amounts (at no more than 25% of the award given to respondent), and exempted governmental actors. It has likewise discharged that function in a wide array of federal statutes that expressly contain punitive damages provisions. See Amicus Brief of the Int'l City/County Mgmt. Ass'n, et al., at 8-9 & n.2. Courts have no authority under Section 504 and Title II to play a similar function.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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